IN THE HIGH COURT OF BOMBAY AT GOA
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FIRST APPEAL NO. 6 OF 1999

Shri K. K. Mohammed,
proprietor of K.K.M. Restaurant,
Shop No.4, Patta Center Bldg.,
KTC Bus Stand,
Panaji-Goa. ...Appellant.

Versus

Mr. K. Abdulla,
r/o Flat No.7,
Raj Mahal Bldg.,
Mala, Panaji, Goa. ....Respondent.

Mr. A. B. D'Sa, advocate for the appellant.

Mr. J. E. Coelho Pereira, Senior Advocate with Mr. S. Karpe, advocate for the respondent.

CORAM : B. H. MARLAPALLE, J.

DATE : 29th October, 2004.

ORAL JUDGMENT

This Appeal arises from the Decree dated 15th October, 1998, passed by the learned Civil Judge, Senior Division at Panaji, in Special Civil Suit No.27/97/B and the defendant is the appellant.

2. The plaintiff, pursuant to the Agreement dated 14th February, 1994, between the parties, had advanced a loan of Rs.2,00,000/- to the defendant and the money was received by the defendant on the same date. The plaintiff issued a legal notice dated 27th January, 1997, to the defendant contending that the loan repayment was in default and from 8th August, 1995 to 8th February, 1997, no repayments were made and, therefore, an amount of Rs.1,27,500/- was due to be

received from the defendant. At the same time the plaintiff had conceded that as on 8th August, 1995, he had received an amount of Rs.1,07,500/- from the defendant towards the loan repayment. This legal notice was replied to on 8th February, 1997 and it was informed that no amount was payable to the plaintiff and the total loan amount alongwith interest was already repaid. The plaintiff, therefore, filed the Special Civil Suit No.27/97 and prayed for recovery of Rs.1,27,050/- with further interest at the rate of 3% per month from 8th February, 1997. The defendant filed reply and contended that in addition to the amount of Rs.1,00,000/- paid to the plaintiff by encashing Fixed Deposit receipts, the defendant had paid Rs.1,50,150/-, thus making a total payment of Rs.2,50,150/- as on 13th March, 1995 and he did not owe anything to the plaintiff. The defendant further contended that he was an employee of the plaintiff for sometime and when he needed a loan of Rs.2,00,000/- he had approached the plaintiff and shown his willingness to hand over the Fixed Deposit receipts, one for Rs.50,000/- and two for Rs.25,000/-each. However, taking advantage of the defendant being an illiterate person, the interest amount agreed at 24% per annum or 2% per month was enhanced by the plaintiff to 36% per month or 3% per month.

3. On behalf of the plaintiff he himself entered the witness box and so did the defendant, i.e. P.W.1 and D.W.1 respectively. Though in the plaint the plaintiff had

stated that he had received an amount of Rs.1,07,500/- by 8th August, 1995, while in the witness box he was confronted with the receipts and the following payments were duly proved to have been received by him:-

(i) Rs. 25,000/- on 2.3.1994;

(ii) Rs.75,000/- on 21.3.1994;

(iii) Rs.10,000/- on 19.9.1994;

(iv) Rs.25,000/- on 6th December, 1994; and

(v) Rs. 15,150/- on 11.3.1995.

Thus the payments proved to have been received by the plaintiff came to Rs.1,50,150/-. The dispute between the parties thus narrowed down on the balance payment of Rs.1,00,100/- only. The transaction of loan has been admitted pursuant to the agreement dated 14th February, 1994, and, as per the said agreement the loan amount was to be returned within three months. Whether the interest agreed between the parties was at the rate of 2% or 3% per month, was not an issue for adjudication before the trial court and the only issue that remained to be decided was regarding the difference of Rs.1,00,150/-.

4. The learned Judge of the trial Court recorded his finding in favour of the plaintiff and discarded the case of the defendant that he had, in fact, paid an amount of Rs.2,50,150/- to the plaintiff in discharge of the loan amount of Rs.2,00,000/-. If the evidence on record proves that the defendant had, in fact, paid Rs.2,50,150/- to the plaintiff, the suit shall fail.

5. Before the trial Court the documentary evidence in the nature of pass book of Saving Bank account with the Goa Urban Co-operative Bank Ltd. and the Bicholim Urban Co-operative Bank Ltd. was placed on record at Exhs.27 and 28 (colly.). Both these pass books have proved the entries of the admitted amount between the parties. The first pass book at Exh.27 colly. does not cover the transactions in the months of July to October, 1994, whereas the pass book at Exh.28 covers the period from September 15th and thus there is no proof by way of pass book entries for the period of July and August regarding the payments made by the defendant to the plaintiff. It is interesting to note that while the plaintiff was in the witness box and under cross-examination he was confronted with a receipt at Exh.25 for an amount of Rs.1,00,000/-. The receipt is dated 18th August, 1994. He replied thus:-

> "I am shown a receipt dated 18th August, 1994, and I identify that it is in my handwriting, it appears that the stamp with signature has been

pasted on the said receipt. I identify my signature on the stamp at point E."

It is obvious that this was a the disputed amount of Rs.1,00,000/- and on the face of the statement made by the plaintiff in his cross-examination there was nothing left for the decision of the trial Court further and the suit ought to have been dismissed. Unfortunately, the statement escaped from the trial Court and it proceeded to decree the suit. The defendant proved his case that he had in fact paid an amount of Rs.2,50,150/- and that the plaintiff's claim was false. In the circumstances, this Appeal has to succeed.

6. In the result, the Appeal is allowed and the impugned Decree dated 15th October, 1998,passed in Special Civil Suit No.27/97/B is hereby quashed and set aside and with costs throughout. Consequently, Special Civil Suit No.27/97 stands dismissed. The amount deposited be refunded to the appellant. Mr. Coelho Pereira, learned Senior Counsel appearing for the plaintiff, makes an oral application for stay of the withdrawal of the amount. The oral application is hereby rejected.

B. H. MARLAPALLE, J.

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